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No. 937

In the Supreme Court of the United States

October Term, 1970

ANDERSON CHARLES,

Petitioner,

vs.

WINTON M. BLOUNT, Postmaster General of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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(OPINION BELOW IS APPENDED HERETO)

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The above named Petitioner respectfully Petitions this Court to issue its Writ of Certiorari to the said Court of Appeals, to review that court's judgment affirming a final judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which dismissed this Petitioner-Plaintiff's Civil Action for damages in excess of $10,000 and granted Defendant's Motion for Summary Judgment and dismissed the cause for the

reason that there had been no denial of Petitioner-Plaintiff's right of cross-examination.

OPINION BELOW

The opinion of the court of appeals, set forth in the appendix of this Petition at Pages 1a-4a, is not yet reported.

No opinion was filed by the District Court.

GROUNDS FOR INVOKING THIS COURT'S JURISDICTION

Petitioner, Anderson Charles, an employee of the main Post Office in Chicago, Illinois, was demoted from foreman to distribution clerk at an administrative hearing held by the Post Office on September 7, 1966. Charles subsequently instituted an action in the Northern District Court of Illinois seeking judicial review of the decision. On October 2, 1969, the court granted the Government's Motion for Summary Judgment. Charles then appealed to the United States Court of Appeals for the Seventh Circuit. That Court affirmed the District Court's Summary Judgment for the Government in No. 18256, published August 7, 1970.

Petitioner relies on Supreme Court Rule 19, Section 1(b) to confer on this Court jurisdiction to review the decision of the Court of Appeals by Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in relying on 5 C.F.R. Section 771.216, which became effective June 26, 1967, as controlling in Petitioner's administrative hearing held September 7, 1966?

2. Did the Court of Appeals err in relying on this Court's construction of 5 C.F.R. Section 22.607 in *Williams*

v. Zuckert, 371 U.S. 531 (1963) and Williams v. Zuckert, 372 U.S. 765 (1963), as applying with equal force and effect to 5 C.F.R. Section 771.216?

3. Did the Court of Appeals decision effectively deny Petitioner his rights of confrontation?

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. Rule 19 1.(b)

"Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

5 U.S.C. Section 704

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority."

5 C.F.R. Section 22.607

"Appearance of Witness"
"The Commission is not authorized to subpoena witnesses. The employee and his designated representative, and the employing agency, must make their own arrangements for the appearance of witnesses."

5 C.F.R. Section 771.216 "Witnesses," 29 Fed. Reg. p. 11835 (August 19, 1964).

"(a) The agency shall make its employees available as witnesses before a hearing committee when (1) requested by the committee after consideration of a request by the employee or the agency and (2) it is administratively practicable to comply with the request of the committee. If the agency determines that it is not administratively practicable to comply with the request of the committee it shall submit for inclusion in the employee appeal file its written reasons for the declination.
(b) Employees of the agency are in a duty status during the time they are made available as witnesses.
(c) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony."

5 C.F.R. Section 771.216 "Witnesses", 32 Fed. Reg. p. 10909 (July 26, 1967).

"(a) Both parties are entitled to produce witnesses.
(b) The agency shall make its employees available as witnesses before a hearing committee when (1) requested by the committee after consideration for a request by the employee or the agency and (2) it is administratively practicable to comply with the request of the committee. If the agency determines that it is not administratively practicable to comply with the request of the committee, it shall submit for inclusion in the employee appeal file its written reasons for the declination.
(c) Employees of the agency are in a duty status during the time they are made available as witnesses.

(d) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony."

STATEMENT OF THE CASE

Petitioner, an employee of the Main Post Office in Chicago, Illinois, was demoted by administrative action from foreman to distribution clerk on September 7, 1966. The demotion was based on the hearing officer's finding that Petitioner had (1) repeatedly failed to obey orders and willfully disregarded established policy in the administration of the leave program and (2) failed to administer that program with due regard for the needs of the service.

After exhaustion of all available administrative remedies, Petitioner instituted an action for judicial review in the District Court under 5 U.S.C. 704 seeking a new hearing, by the Post Office. The gravamen of the Complaint was that Petitioner had been denied his fundamental right of cross-examination at the administrative hearing. The Court of Appeals, described Petitioner's contention thus:

> "It is undisputed that a witness for the agency quoted a statement made by Laskey, a co-employee of Charles, to the effect that Charles had handed him improperly approved leave requests. *That testimony was distinctly relevant to the charge and undoubtedly prejudicial to Charles.*" (emphasis added) ..... Fed. at .....

The District Court granted the Government's Motion for Summary Judgment and the Court of Appeals affirmed, basing its decision on a construction of 5 C.F.R. Section 771.216 that would require each party to bear the burden of producing witnesses for direct or cross-examination, and the fact that neither Petitioner nor his representative requested that Laskey be produced for cross-examination.

ARGUMENT

Petitioner contends that the Court of Appeals erred by relying on the amended version of Section 771.216, which was not in effect until July 26, 1967, as applying to Petitioner's hearing on September 7, 1966. The applicable regulation, the original Section 771.216, which was in effect from August 17, 1964 until it was amended on July 26, 1967, lacks part (a) of the amended version which reads "(a) Both parties are entitled to produce witnesses." The Federal Register of July 26, 1967, at page 10909 reads:

> "PART 771—EMPLOYEE GRIEVANCES AND ADMINISTRATIVE APPEALS
>
> Witnesses and Arbitration Requirements
>
> Part 771 is amended as follows: Sec. 771.216 is *expanded by the addition of a new provision that both parties to an appeal are entitled to produce witnesses*; . . ." (emphasis added).

On August 19, 1964, when the original Section 771.216 was issued, The Federal Register at page 11834 reads:

> "Part 771 is revised to clarify the intent of certain provisions and to supplement the regulations where a lack of specific coverage has caused operating problems."

A reading of the 1967 statement evidences a concern on the part of the Government that the original Section 771.216 did not afford employees an adequate opportunity to present witnesses on their behalf at administrative

hearings. Evidently the "operating problems" mentioned in the 1964 statement had not been adequately solved by those provisions and the Government concluded that further clarification was necessary. Although it may be argued that this Court's decisions in the *Williams* v. *Zuckert* cases, 371 U.S. 531, 372 U.S. 765 (1963) guaranteed the right of employees to present witnesses; those cases dealt with 5 C.F.R. 22.607, a Section in effect at *Williams'* hearing in 1958 and superseded by Section 771.216 in 1964. It is likely that many hearing examiners held that the rule of *Williams* did not apply after the issuance of Section 771.216, and the Government recognized this and took steps to correct it by the 1967 amendment and its precatory language making clear that employees as well as the agency are entitled to produce witnesses.

The 1967 amendment came almost a year too late for Petitioner, whose hearing took place in 1966. Thus there is grave doubt that the Court of Appeals construction of the 1967 version of Section 771.216, even if correct, applies to the 1964 version.

It is further contended that the Court of Appeals' construction of Section 771.216 finds no support in the language of the Section, and is at odds with Petitioner's rights of confrontation and cross-examination. An agency witness quoted an out of court statement made by one Laskey which the Court of Appeals characterized as "distinctly relevant to the charge and undoubtedly prejudicial to Charles." ..... Fed. at ..... The Court of Appeals held that Charles' proper remedy was to then and there request that the hearing be halted and Laskey be produced. The language of the applicable regulation in *Williams* v. *Zuckert*, 371 U.S. 531, 22.607, fully supports this Court's holding in that case; however there is no

language in the 1964 version of 771.216 suggesting that the employees have a duty to produce witnesses or that the employee would necessarily have been produced upon request.

The Court of Appeals' decision is gravely in conflict with our system of adversary proceedings. Under this decision an agency can introduce hearsay testimony of a declarant that the employee has no desire to question, and have the damaging statement admitted unchallenged unless the employee, at the risk of prejudicing his own case, chooses to disrupt the orderly hearing process by requesting the presence of the out of court declarant. The traditional method puts the burden on each party to produce witnesses favorable to his case, and excludes hearsay testimony because by its nature it denies the other party an opportunity to cross-examine. The Court of Appeals' decision, if allowed to stand by this Court, will seriously diminish the cross-examination rights of employees in future administrative hearings, as well as provide the basis for unanticipated interruptions in administrative hearings with the resulting waste of time and money of all concerned.

CONCLUSION

Wherefore, Petitioner respectfully prays that this Court may issue its Writ of Certiorari to bring up and review this case, whereupon the judgments below may be reversed, and for all other proper relief.

Respectfully submitted,

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APPENDIX

In The
UNITED STATES COURT OF APPEALS
For The Seventh Circuit

September Term, 1969 — April Session, 1970

No. 18256
Anderson Charles,
Plaintiff-Appellant,
v.
Winton M. Blount, Postmaster General of the United States,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 7, 1970

Before Murrah, *Senior Circuit Judge,*[1] Kiley and Cummings, *Circuit Judges.*

Murrah *Senior Circuit Judge.* Charles, an employee of the main post office in Chicago, Illinois, was demoted by administrative action from foreman to distribution clerk. The demotion was based on a finding that he had

[1] Senior Circuit Judge Murrah of the United States Court of Appeals for the Tenth Circuit is sitting by designation.

(1) repeated failed to obey orders and willfully disregarded established policy in the administration of the leave program and (2) failed to administer that program with due regard for the needs of the service.

After the exhaustion of all available administrative remedies, Charles instituted the present proceedings in the District Court seeking judicial review of his demotion. The gravamen of the complaint was that Charles had been denied his fundamental right of cross-examination at the administrative hearing; that denial of that right tainted the fairness of the hearing and thus vitiated the demotion. Moreover, Charles asserted that the evidence produced at the hearing was insufficient to sustain the second charge. The prayer of the complaint was that the hearing be reopened to permit cross-examination of a hearsay witness. The trial court granted the government's motion for summary judgment "because there has been no denial of the plaintiff's right of cross-examination."

In cases of this kind judicial review is limited to the inquiry whether the administrative proceedings which resulted in the employee's discharge or demotion conformed to the requirements of administrative due process, *i.e.*, whether the employee was accorded a fair and open hearing on articulated charges with the right of confrontation and cross-examination. *Morgan* v. *United States*, 304 U.S. 1; *Vitarelli* v. *Seaton*, 359 U.S. 535; *Greene* v. *McElroy*, 360 U.S. 474; *Brown* v. *Zuckert*, 349 F.2d 461 (7th Cir. 1965), cert. denied 382 U.S. 998; *McGhee* v. *Johnson*, 420 F.2d 445 (10th Cir. 1969).

The essential elements of this species of due process are admittedly embodied in regulations which specifically provide for a hearing with the right of confrontation and cross-examination. See 5 C.F.R. Section 752.201, et seq.; 5 C.F.R. Section 771.209, et seq.; 5 C.F.R. Section 772.305, et seq.; and *McGhee* v. *Johnson*, *supra* at note 1. But the applicable regulations permissibly contemplate that each party shall bear the burden of producing wit-

nesses for direct or cross-examination. 5 C.F.R. Section 771.216.[1]

It is undisputed that a witness for the agency quoted a statement made by Leahey, a co-employee of Charles, to the effect that Charles had handed him improperly approved leave requests. That testimony was distinctly relevant to the charge and undoubtedly prejudicial to Charles. But at no time during the administrative hearing did Charles or his representative ask that Leahey be produced for confrontation and cross-examination. On judicial review, it is urged for the first time that the failure to request the production of Leahey could and should be excused and the hearing reopened especially since Charles had no reason to anticipate Leahey's prejudicial testimony.

It is true as suggested that a litigant's failure to meet the initial burden of producing witnesses for either direct or cross-examination may be excused under certain circumstances. *Williams* v. *Zuckert*, 372 U.S. 765. Indeed in informal proceedings of this kind wide latitude should be accorded to the parties in the production of evidence subject of course to the requirements of an orderly

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[1] § 771.216 Witnesses.

(a) Both parties are entitled to produce witnesses.

(b) The agency shall make its employees available as witnesses before a hearing committee when (1) requested by the committee after consideration of a request by the employee or the agency and (2) it is administratively practicable to comply with the request of the committee. If the agency determines that it is not administratively practicable to comply with the request of the committee, it shall submit for inclusion in the employee appeal file its written reasons for the declination.

(c) Employees of the agency are in a duty status during the time they are made available as witnesses.

(d) The agency shall assure witnesses freedom from restraint, interference, coercion, discrimination, or reprisal in presenting their testimony.

hearing. In Williams the case was ultimately remanded to the trial court to determine, ". . . whether the petitioner, desiring the presence of witnesses at his hearing, either discharged his initial burden under the applicable regulations by making timely and sufficient attempt to obtain their presence or, under the circumstances and without fault of his own, was justified in failing to make such attempt, and, if so, whether proper or timely demand was made upon the [agency] so that it was required to produce such witnesses for cross-examination." Williams, supra at 765.

But unlike Williams the record in our case affirmatively shows that during the entire administrative hearing Charles did not request that Laskey be produced for cross-examination. This inaction at the administrative level may very well have led the trial court to conclude that Charles had not timely asserted the right of cross-examination as required by Williams. In any event, we think that the trial court's decision was fully justified in the circumstances. The judgment is affirmed.

JUDGMENT AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 937

ANDERSON CHARLES, PETITIONER

v.

WINTON M. BLOUNT, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

1. In June 1966, petitioner was demoted from foreman to distribution clerk in the main Chicago post office because of his repeated failure to obey orders, his disregard for established policy in the administration of the leave program and his failure to administer the leave program with due regard for the needs of the service. The decision to demote was not made until petitioner had been notified in writing of the factual foundation underlying the charges against him and had been given an opportunity to reply.

At petitioner's request, the regional office of the Department conducted a hearing at which both peti-

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tioner and the Department produced witnesses. Upon completion of the hearing, the regional office upheld the demotion. After reviewing all of the evidence, the Civil Service Commission's Board of Appeals and Review found that the record fully supported the Department's charges against the petitioner and accordingly upheld the Department's action.

Petitioner then filed this action in the district court seeking, *inter alia*, a new administrative hearing to enable him to crossexamine one Douglas Laskey. A witness at the Department hearing had testified about a conversation the witness had had with Laskey, who was not a witness. The district court granted the government's motion for summary judgment and the court of appeals affirmed, on the ground that neither petitioner nor his representative had made any request that Laskey be produced for confrontation and crossexamination.

2. Since Laskey was not called by either side to testify and was not present at the hearing, petitioner's contention that he was not permitted to crossexamine Laskey is, in reality, an objection to the fact that Laskey was not produced by either side. In *Williams* v. *Zuckert*, 371 U.S. 531, this Court held that the party desiring the presence of certain witnesses at an administrative hearing bears the "initial burden" of producing them. If he has failed to do so, he cannot complain that they were not produced by the agency. In this case, petitioner neither attempted himself nor asked the Department to secure Laskey's presence. If the opportunity to question Laskey was

crucial, as is now belatedly contended, an objection should have been raised at the hearing at the time the hearsay evidence was introduced and a postponement should have been sought to locate Laskey. Neither petitioner nor his representative at the hearing objected to the evidence or sought a postponement.

Petitioner also argues that 5 C.F.R. 771.216, as in effect at the time of the hearing, did not indicate that an employee, as well as the agency, was entitled to produce witnesses. Petitioner's reliance on this argument, however, is inconsistent with the fact that he presented other witnesses at the agency hearing. Moreover, even if the regulation relieved him of the "initial burden" of producing witnesses established in *Williams* v. *Zuckert, supra,* he was obligated to object to the evidence when introduced and to request the Department to produce Laskey for crossexamination. There is no basis for petitioner's assertion (Pet. 8) that the Department would not have produced Laskey on request.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970